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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

DATE: AUG 1 4 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a distributor of precision tools. It originally sought to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered on the labor certification did not require a member of the professions holding an advanced degree or an alien of exceptional ability as selected on the Form I-140, Immigrant Petition for Alien Worker.

On appeal, counsel asserts that he had requested that the employment visa category be changed to an EB3 skilled worker/professional classification prior to the adjudication of the petition and that the director erroneously denied the petition based on the original selection of an advanced degree professional.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[1]

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

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[1]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**[2]

(Bold emphasis added.) While the director did not cite this regulation, it provides the legal basis for his ultimate conclusion.

The Form I-140 was filed on March 19, 2007. On Part 2.d of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The Form ETA 750, however, requires no more than a bachelor's degree,[3] therefore the director denied the petition on December 16, 2010 because the job offer portion of the Form ETA 750 failed to demonstrate that either an advanced degree professional or an alien of exceptional ability was required.[4]

On appeal, counsel asserts that he notified the director prior to the adjudication of the Form I-140 that the petitioner requested that the visa category be changed to the skilled worker/professional

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[2]There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the Form ETA 750 was replaced by the ETA Form 9089 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[3] The original Form ETA 750 was not available to the director. The petitioner requested that the director obtain a duplicate labor certification from DOL. The record contains a duplicate Form ETA 750 annotated by the Texas Service Center. It requires that the beneficiary possess 4 years of college culminating in a Bachelor degree in mechanical engineering. Subsequently, the petitioner obtained the original Form ETA 750. It contains whited out portions as well as DOL correction stamps. On this Form ETA 750, the years of experience have been whited out and "0" inserted. On remand, the director should examine this discrepancy and confirm that the corrected version of the Form ETA 750 is accurate.

[4] An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

category (Part 2.e of the Form I-140) instead of the advanced degree professional classification (Part 2.d. of the Form I-140). Counsel cites three different dates and methods of notifying the director that a change in visa classification was requested:

- December 15, 2007- request for the change of category processed via e-mail;
- April 4, 2008- request for the change of category processed by mail, certified mail receipt 70070220000246474256;
- April 21, 2008- request for the change of category processed over the phone, confirmation number T1N1120801952TSC.

As noted above, the petitioner was denied on December 16, 2010 based on failure to show that the labor certification required a worker with an advanced degree.

It is noted that the record of proceedings contains a copy of counsel's e-mail and a copy of an April 4, 2008 letter accompanied by a certified mail receipt as noted above, which requests a change in visa classification. Counsel's assertions on appeal are persuasive. As further noted by counsel, USCIS policy as expressed in the June 25, 2009 USCIS guidance submitted on appeal was to accede to requests for a change of visa classification on the Form I-140 if it was made prior to adjudication.

As all of counsel's requests to amend the visa classification originally selected on the Form I-140 from a second preference advanced degree professional to a third preference skilled worker/professional category were made prior to the director's December 16, 2010 adjudication, the director's decision is withdrawn and the case will be remanded for a full adjudication of the Form I-140 on the merits based on a request for a third preference visa category.

The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of section 203(b)(3) of the Act. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.